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IN THE

Supreme Court of the United States

No. [redacted] 139

OCTOBER TERM, 1961

STANLEY E. HENWOOD, RICHARD L. ROEMER, LEWIS M. POE, individually, as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE and as proxies of said Committee, JAMES V. ARMOGIDA, ROBERT G. BALLANCE, FRED A. BERSHARA, NATHANIEL R. DUMONT, JOE L. FOSS, WILLIAM D. LAWRY, ELMER M. LUTHER, JR., EDWARD H. McLAUGHLIN, CHARLES SODERSTROM, JOHN A. STEEL, CLARENCE L. SUMMERS, ROY L. WILLIAMS, LOUIS W. WULFEKUHLER, ALFRED T. ZODDA, individually and as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE, BERNARD F. GIRA, HERBERT J. PETERSEN and UNITED INDUSTRIAL CORPORATION, a corporation,

Defendants and Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,

Plaintiffs and Respondents.

PETITION FOR CERTIORARI.

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IN THE

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No. .....

OCTOBER TERM, 1961.

STANLEY E. HENWOOD, RICHARD I. ROEMER, LEWIS M. POE, individually, as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE and as proxies of said Committee, JAMES V. ARMOGIDA, ROBERT G. BALLANCE, FRED A. BERSHARA, NATHANIEL R. DUMONT, JOE L. FOSS, WILLIAM D. LAWRY, ELMER M. LUTHER, JR., EDWARD H. McLAUGHLIN, CHARLES SODERSTROM, JOHN A. STEEL, CLARENCE L. SUMMERS, ROY L. WILLIAMS, LOUIS W. WULFEKUHLER, ALFRED T. ZODDA, individually and as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE, BERNARD F. GIRA, HERBERT J. PETERSEN and UNITED INDUSTRIAL CORPORATION, a corporation,

Defendants and Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,

Plaintiffs and Respondents.

PETITION FOR CERTIORARI.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Stanley E. Henwood, Richard I. Roemer and Lewis M. Poe, individually and members of the United Industrial Corporation Stockholders' Protective Committee, and as proxies of said Committee, respectfully petition this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse the judgment and orders of that court and, in respect thereto, set forth as follows:

Jurisdiction.

Jurisdiction is conferred by Title 15, Section 78aa, U. S. Codes, and Title 28, Section 1254(1), U. S. Codes. The decision of the United States Court of Appeals for the Ninth Circuit was rendered January 17, 1962. A petition for rehearing and a petition for modification of the same were duly filed within the time permitted by law and the rules of that court and were denied February 28, 1962. This petition for certiorari is filed within ninety (90) days of the denial of the petition for rehearing and of the motion to modify the Circuit Court's judgment.

Constitutional Provisions, Statutes and Regulations Involved.

Title 15, Section 78n(a) provides as follows:

> "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Regulations (Text in Appendix).

Regulation 14(a)-9 Under the Securities and Exchange Act of 1934:

Rule 14a-9. False or Misleading Statements. (In full in Appendix).

Rule 14a-11. In Appendix.

First Amendment to the United States Constitution.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press;"

Fifth Amendment to the United States Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Opinion Below.

The opinion below is printed in Appendix "A." It is reported in 298 F. 2d 641 (1962) (March 26, 1962 Edition Adv. Sheets).

Facts.

United Industrial Corporation is a Delaware corporation. It has been engaged in certain type of manufacturing relating to defense work. The securities of United Industrial Corporation are widely distributed among 15,000 stockholders. Until January 16, 1961, its stock was listed and registered on the New York Stock Exchange and the Pacific Coast Stock Exchange. It

commenced operations in January of 1960 as a result of a merger of Topp Industries Corporation, a Delaware corporation, and United Industrial Corporation, a Michigan corporation. The surviving corporation, Topp Industries Corporation, thereafter changed its name to United Industrial Corporation. Bernard F. Gira was President of the corporation and Herbert J. Petersen was Executive Vice President. Both had been the principal officers of Topp Industries Corporation and succeeded themselves in the United Industrial Corporation during the year 1960.

It appeared that there would be write downs and adjustments of various sums received by the corporation. It was estimated that these write downs and adjustments might be within the vicinity of $6,000,000.00 to $7,000,000.00. During the course of meetings of the Board of Directors, it was suggested by other members of the Board of Directors that Gira and Petersen resign as officers and that such resignation would facilitate the pending study and adjustment of the corporations' accounts.

At the culmination of three (3) days' meeting, on January 14, 1961, Gira and Petersen tendered their resignations. Gira and Petersen together held approximately 100,000 shares of stock in the company which represented a major part of their personal assets. Gira conferred with Richard I. Roemer, an attorney with the firm of Vaughan, Brandlin & Baggot [R. T. 214-215]. Roemer and J. J. Brandlin met with Gira and discussed their problem. Gira and Petersen stated at

this meeting that they were not interested in any proxy contest [R. T. 1246-1249; Ex. 33, pp. 192-193]. At this meeting Brandlin indicated that the *firm* might be interested in handling a *proxy* contest for *other* interested stockholders. This would depend on whether he was able to organize a slate of *outstanding business men*. Brandlin also stated that the firm would need a stockholders' list. Gira indicated that he and Petersen had such a list and that they would let Brandlin use it [R. T. 1248-1250]. Two (2) days later, they delivered a stockholders' list to Roemer. (Management, of course, at all times, had such a list.)

The selection of the Stockholders' Protective Committee was made by Attorneys Brandlin and Roemer [R. T. 234-235, 1340-1341, 324-328, 1341-1342]. After the selection of the stockholders' committee of prominent citizens, proxy solicitation material was prepared and submitted on March 13, 1961 to the Securities and Exchange Commission for their clearance [R. T. 277-278, 302, 1797-1798]. The Securities and Exchange Commission staff indicated they wanted to take testimony of various members of the committee for determining the adequacy and accuracy of the proxy solicitation material of the Stockholders' Protective Committee [R. T. 1166-1169; Ex. 29-39, 42]. These proceedings ran concurrently in Washington, D.C. and Los Angeles, California for five (5) days [R. T. 1279]. After three (3) hearings, the Securities and Exchange Commission cleared the material.

Proxies by the Stockholders' Protective Committee of fifteen (15) well-known persons, including leading industrialists, were thereafter distributed in fifty (50) states of the union and several foreign countries at considerable expense. The proxies sent out to the stockholders of record were in two forms, as follows:

"United Industrial Corporation
Proxy Solicited by Stockholders' Protective Committee
Annual Meeting of Stockholders
To Be Held May 10, 1961

The undersigned hereby appoints Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe, and each of them, with full power in each of them to act without the others and with full power of substitution, the Proxy Agents of the undersigned to vote at the Annual Meeting of Shareholders of UNITED INDUSTRIAL CORPORATION presently set to be held at the offices of the corporation at 100 West Tenth Street, Wilmington, Delaware, at 11:30 a.m. on the 10th day of May, 1961, and at all adjournments, continuances, and any and all other changes of date thereof, all shares of common and preferred stock of such corporation which the undersigned could vote if personally present, cumulatively for the election to the Board of Directors of the corporation of any or all of the nominees named in the Proxy Statement of the Stockholders' Protective Committee dated March 27, 1961 (receipt of which is hereby acknowledged), and on any other business that may properly come before such meeting. The undersigned hereby revokes any proxy or proxies

heretofore given with respect to these shares of stock.

Dated, this ..... day of ....., 1961.

.....

.....

[Signature of Stockholder(s)]

Note: Jointly owned stock should be signed by all owners.

(If executed by an attorney-in-fact, the authorizing instrument or a certified copy thereof must accompany the proxy.)

Form 100F"

"United Industrial Corporation
Proxy Solicited by Stockholers' Protective Committee
Meeting of Stockholders
Presently Set to Be Held July 27, 1961

The undersigned hereby appoints Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe, and each of them, with full power in each of them to act without the others and with full power of substitution, the Proxy Agents of the undersigned to vote at the Meeting of Shareholders of UNITED INDUSTRIAL CORPORATION presently set to be held at the offices of the corporation at 100 West Tenth Street, Wilmington, Delaware on the 27th day of July, 1961 (whether such meeting be designated an annual, special, adjourned, postponed or continued meeting, or as it may be otherwise designated, and in any event the

next meeting of stockholders for the election of directors), and at all adjournments, postponements, continuances, and any and all other changes of date thereof, all shares of common and preferred stock of such corporation which the undersigned could vote if personally present, cumulatively for the election to the Board of Directors of the corporation of any or all of the nominees named in the Proxy Statement of the Stockholders' Protective Committee dated March 27, 1961 (receipt of which is hereby acknowledged), and on any other business that may properly come before such meeting. Proxies received by the Committee pursuant to this solicitation will be voted for the election as directors of the company of the nominees listed therein, or for so many of them, and in such order as the Proxy Agents in their discretion may determine. If any nominee shall become unavailable for election for any reason, which is not now foreseen, the proxies will be voted for the election of some other qualified person. The undersigned hereby revokes any proxy or proxies heretofore given with respect to these shares of stock.

Dated ....., 1961.

.....

.....

[Signature of Stockholder(s)]

Note: Jointly owned stock should be signed by all owners.

(If executed by an attorney-in-fact, the authorizing instrument or a certified copy thereof must accompany the proxy.)

Form 300"

As a result of their solicitations of proxies, the Stockholders' Protective Committee obtained proxies for approximately 1,200,000 shares of stock, or a practical majority of the stock of the corporation to vote at the annual election. The annual meeting was postponed from time to time, first at the request of the Company and the Securities and Exchange Commission and later the court postponed the proceedings from time to time, including the United States Court of Appeals for the Ninth Circuit, pending the appeal, and until sixty days after its judgment became final.

Although the Securities and Exchange Commission had cleared the material, the Securities and Exchange Commission petitioned the court to *void* the proxies obtained by the Stockholders' Protective Committee at considerable cost because it alleged in a complaint that the proxy material had failed to state

"(i) that the defendants, Bernard F. Gira and Herbert J. Petersen, were instrumental in initiating and organizing the United Industrial Corporation Stockholders' Protective Committee and in formulating on behalf of said committee a slate of directors of United Industrial Corporation in opposition to the slate of directors formulated by the management of United Industrial Corporation;

"(ii) omitted to state that the defendants Bernard F. Gira and Herbert J. Petersen have participated with representatives of the Stockholders' Protective Committee and aided said Committee and its representatives in conducting proxy solicitations in opposition to the management of UIC;

"(iii) stated that the defendants Bernard F. Gira and Herbert J. Petersen are not participating

with the Stockholders' Protective Committee in soliciting proxies in opposition to the management of UIC;

"(iv) stated that the formation of the Stockholders' Protective Committee was initiated solely as a result of complaints of the defendants Elmer J. Luther, Jr. and Roy L. Williams; and,

"(v) stated that certain losses sustained by UIC and diminution of stockholders' equity occurred during the time that Bernard F. Fein was Chairman of the Executive Committee."

The Findings of the District Court were actually drawn by the attorney for the S. E. C. Many of the findings are not sustained by the evidence.

But if all the findings were conceded they would not be sufficient to forfeit proxies without the knowledge or consent or wish of the proxy givers, and without specific congressional legislation authorizing it, and probably not even with it under the First and Fifth Amendments, United States Constitution.

The District Court of the United States, Southern District of California, Central Division, nevertheless, voided the proxies.

On appeal, the United States Court of Appeals for the Ninth Circuit modified the findings and judgment of the District Court but sustained the order *voiding* the proxies. On petition for rehearing the appellants moved the Circuit Court of Appeals to allow them to send out letters to the stockholders who gave proxies informing them of the information which the Securities and Exchange Commission and Circuit Court stated had

been omitted and to ask the stockholders if they still wished to recall their proxies or to have the proxies voted. The Court of Appeals denied the motion on February 28, 1962, and denied rehearing on that date.

The Circuit Court, however, did order that any meeting of stockholders of United Industrial Corporation, except for the purpose of adjournment, be delayed until sixty (60) days after its decree became final. A motion before the Circuit Court on April 24, 1962 to delay the meeting further was denied by the Court on that date and an application to Justice Douglas was also denied.

On April 30, 1962, the United States District Court for the Southern District of California, Central Division, spread their mandate, the effect of which was to *void* all of the proxies. At that time, objections were filed to spreading the mandate as follows:

I.

Title 15, Section 78n(a) U. S. Codes is unconstitutional in that it is too vague and indefinite to form the basis of any rule or regulation pursuant thereto and fails to set up any definite legislative standards for the Securities and Exchange Commission to follow. Therefore any order or judgment based upon this unconstitutional statute, or any regulation pursuant thereto, is void.

II.

No statute, rule or regulation authorizes cancellation of proxies. The order and judgment voiding the proxies of the Stockholders' Protective Committee and 1,200,000 votes by proxy is therefore void and in excess of the jurisdiction of the court.

III.

Section 78n(a) of Title 15, U. S. Codes, is in violation of the due process clause of the Fifth Amendment. U. S. Constitution in that it does not provide for notice and an opportunity to be heard by the stockholders who gave the proxies before their proxies were cancelled, and thus it took a property right away from them without notice and without an opportunity to be heard on whether they wanted their proxies cancelled.

IV.

Neither Section 78n(a) of Title 15, U. S. Codes, nor the regulations pursuant thereto provide for a notice and an opportunity to be heard by the stockholders whose rights and property are affected and who has a constitutional right to be heard.

V.

Section 78n(a) of Title 15. U. S. Codes, and the regulations issued pursuant thereto violate the First Amendment to the Constitution of the United States in that they deprive stockholders or their agents of freedom of speech and of the press guaranteed by the First Amendment. Therefore the judgment in this case, based upon an unconstitutional statute, and unconstitutional regulations pursuant thereto, is a nullity.

VI.

Regulation 14, 17 C. F. R., Section 240.14, promulgated thereunder are void because they are pursuant to the authority of Statute 15 U. S. C., Section 78n(a) which is itself unconstitutional as it is both an unlaw-

ful delegation of legislative functions and too vague and indefinite and uncertain to form a basis of criminal and civil sanctions.

VII.

The court erred in holding that the Securities and Exchange Commission, or any court on their application may interfere with and cancel the right of a stockholder to give a proxy of his shares of stock to vote his rights or to cancel the rights of proxy holders to vote those rights. Such a right is a property right protected by the due process clause of the Fifth Amendment to the Constitution of the United States.

At no time were the stockholders who gave the proxies notified by the Securities and Exchange Commission, nor were they represented or given an opportunity to be heard in the action to void their proxies. Some of the stockholders by affiadavit stated that they still wished to have their proxies voted and had not authorized anyone to revoke or invalidate their proxies. (See Appendix.)

A motion to stay the Stockholders annual meeting until this Court passed on this writ was denied by Justice Wm. O. Douglas. The solicitor-general stated, however, in his memorandum to the court, that if this Court reversed the judgment below it could nullify the election which took place May 9, 1962, and direct a new election be held.

Questions Presented.

I.

Whether Title 15, Section 78n(a), inherently and, as construed and applied in this case, is unconstitutional in that it constitutes an unlawful delegation of legislative power and authority to the Securities and Exchange Commission, and therefore violates the due process clause of the Fifth Amendment to the Constitution of the United States and violates the basic powers of separation of legislative, executive (administrative) and judicial departments of the Government.

II.

Whether Congress intended to give the Securities and Exchange Commission authority to apply censorship to letters and communications between stockholders and their agents and whether, if it did, such censorship constitutes a violation of and an abridgement of freedom of speech and of the press guaranteed by the First Amendment to the Constitution of the United States.

III.

Whether Section 78n(a), of Title 15, U. S. Codes, is so vague, indefinite and uncertain as to fail to set up an adequate standard of conduct which would form the basis of criminal or civil sanctions.

IV.

Whether Section 78n(a), of Title 15, U. S. Codes, is so vague, indefinite and uncertain as to fail to give any legislative standards to the Securities and Exchange Commission within the scope of its legislative authority.

V.

Whether the trial court erred in cancelling and disenfranchising 1,200,000 shares of stock by proxy and

whether the Circuit Court erred in affirming this cancellation. Whether such cancellation impaired the constitutional right of freedom of contract.

VI.

Whether, if jurisdiction does exist to censor proxies, the holders of the proxies should equitably be given an opportunity to correct any omissions without disenfranchising and voiding all of the proxies.

VII.

Whether the stockholders who gave the proxies had a right to be heard upon notice before the proxies which they gave were voided and whether Section 78n(a) of Title 15, U. S. Codes, inherently and as construed and applied in failing to give the stockholders an opportunity to be heard before their proxies were cancelled took away a property right from them in violation of the Fifth Amendment to the Constitution of the United States.

VIII.

Whether Section 78n(a) of Title 15, U. S. Codes, and the regulations issued pursuant thereto violate the Fifth Amendment to the Constitution of the United States in its due process clause in that it fails to provide for a notice and an opportunity to be heard by the stockholders whose rights and property are affected and who have a constitutional right to be heard.

IX.

Whether Section 78n(a) of Title 15, U. S. Codes, and the regulations issued pursuant thereto violate the First Amendment to the Constitution of the United States in that they deprive stockholders and/or their agents of freedom of speech and of the press guar-

anteed by the First Amendment to the Constitution of the United States; therefore, whether the judgment in this case based upon an unconstitutional statute and upon censorship and unconstitutional regulations pursuant thereto is a nullity.

X.

Whether Regulation 14, 17 C. F. R., and Section 240.14 promulgated thereunder are void because they are issued pursuant to Section 78n(a) of Title 15, U. S. Codes, which is itself unconstitutional as an unlawful delegation of legislative functions and too vague and indefinite and uncertain to form the basis of criminal and civil sanctions.

XI.

Whether the court erred in holding that the Securities and Exchange Commission, or any court on their application may interfere with and censor and cancel the right of a stockholder to give a proxy of his shares of stock, a property right to vote his rights, and whether the Securities and Exchange Commission or the court on their application may cancel the rights of proxy holders to vote those rights.

XII.

Whether such a right is property protected by the due process clause of the Fifth Amendment to the Constitution of the United States.

XIII.

Whether the findings of the District Court or Circuit Court are sustained by the evidence and whether they can or should support the judgment below.

Petitioners incorporate by reference all matters set out on the appendix as though fully set forth in this petition.

Reasons for Granting the Writ of Certiorari.

The questions involved in this case are among the most important questions of constitutional and statutory law as applied to stockholders coming before this court and involve questions of imperative public importance.

Constitutionality of Section 78n(a), Title 15, Challenged Jurisdiction to Censor Proxy Material and Cancel Proxies Does Not Exist.

This court has never heretofore determined the constitutionality of Section 78n(a) of Title 15, U. S. Codes, governing proxies nor the questions involved herein as to whether that section could constitutionally delegate all of the authority on which the Securities and Exchange Commission has assumed to act and on which it has acted nor has the question of censorship which the Securities and Exchange Commission has taken unto itself of all proxy material been authorized or passed upon by this court nor can we find any statute which gives a court of the United States jurisdiction to *cancel proxies* any more than it could seize books and destroy them because the material did not comport with its views.

S. E. C. Recognizes Questions as Important.

During the oral argument before the United States Court of Appeals at Los Angeles, California, counsel for the Securities and Exchange Commission stated that the question of validity of proxies is one of the most important questions before the Commission.

Findings Not Sustained by the Evidence.

The findings are not sustained by the evidence, and are contrary to the law and evidence. Twelve of the fifteen members of the Stockholders' Committee were

cleared and dismissed from the case. Yet their proxies were cancelled and they were restrained from acting under the orders of the court below.

The scope of the delegation of statutory authority to an administrative body was first voiced by this court in an exhaustive opinion by the late Justice Charles Evans Hughes in *Panama Refining Company v. Ryan*, 293 U. S. 388, 448, and in *Schechter Poultry Corporation v. United States of America*, 295 U. S. 495.

Delegation Unconstitutional.

Delegation by Congress of its essential legislative functions is precluded by the provisions of the Federal Constitution, Article I, Section I and of Article I, Sections 8 and 18, empowering Congress to make all laws which shall be necessary and proper for carrying into execution its general powers.

Panama Refining Company v. Ryan, 293 U. S. 421, 79 L. Ed. 446, 459.

As stated in the *Panama Refining Company* case:

"As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

Likewise, Title 15, Section 78n(a)

"declares no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions. . . ."

> "The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of Government."

As stated in *Schechter v. United States*, 295 U. S. 529:

> "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

Censorship Forbidden Violates First Amendment.

Nor has this court ever passed upon the constitutionality of the regulations issued by the Securities and Exchange Commission which constitute censorship of proxy material of stockholders and a voiding of the same based upon their censorship in violation of the First Amendment to the Constitution of the United States.

Both the Federal and State Constitutions contain guarantees of freedom of speech and of the press and it has been held that an invasion of the right of freedom of speech also offends the due process clause of the Fourteenth Amendment. Freedom from previous restraint or censorship is guaranteed in *Near v. Minnesota*, 283 U. S. 697, 76 L. Ed. 1357.

Fiske v. Kansas, 274 U. S. 380, 71 L. Ed. 1108;

Grosjean v. American Press Company, 297 U. S. 233, 80 L. Ed. 660.

The requirement of a license to speak or to distribute literature is invalid if used as the means of prohibition or censorship.

Lovell v. Griffin, 303 U. S. 444, 82 L. Ed. 949.

Stockholders of 1,200,000 Shares Disenfranchised.

The effect of the judgment of the District Court, affirmed by the Circuit Court, and its refusal to modify that judgment was to disenfranchise the owners of approximately 1,200,000 shares of stock.

It is stated by writers and the courts that:

> "The problem is to avoid disfranchisement of the innocent security holders who gave the violator their proxies"

In *Securities and Exchange Commission v. Trans-America Corporation*, 67 Fed. Supp. 326, at 329 (mofified and affirmed 163 F. 2d 511), the court did not void the proxies for violation of Securities and Exchange Commission regulations and held that the violations did not invalidate the proxies from use for the election of directors.

Conflict in Circuits.

This ruling of the District Court of the Third Circuit is in conflict with the holding of the Court of Appeals for the Ninth Circuit in this case and this court should grant certiorari to resolve the difference and establish the duty of the courts below under their equitable powers.

Equity Abhors Forfeitures. Correction, Not Cancellation, Should Be Permitted.

Like political elections, both sides in a proxy fight should have their chance to have their say uninterfered with or censored by the government. Like a Kennedy-Nixon debate, omission by one side to state any facts of value is sure to be met by statements from the other side covering the subject. In this case it is extremely

doubtful that the omitted matter, if or when conveyed to the stockholders, would change or cancel any proxies.

Why, then, did the S. E. C. step in to side with the management that would surely have been ousted by 1,200,000 share votes? The record is silent on this subject.

The government has no business or right to throw its weight on the side of management. No statute or regulation gives it such right, assuming that the Constitution would permit it.

We challenge S. E. C.'s jurisdiction and the jurisdiction of the courts in this respect under the First and Fifth Amendments to the U. S. Constitution to interfere or cancel proxies. Congress has not yet given this power of restraint and censorship to the S. E. C. or the courts. Nor if it did, has the constitutionality of such authority been passed upon. We think this presents fundamental questions for this court to rule upon and request that it does so by granting this petition for a writ of certiorari.

Since the proceedings in this case were equitable, the court should not have disfranchised the innocent security holders and should have permitted the Stockholders' Protective Committee to have sent out letters to the stockholders who gave their votes before arbitrarily and capriciously cancelling the proxies. See

Securities and Exchange Commission v. Trans-America Corporation, 163 Fed. Supp. 511 (cert. denied 332 U. S. 847);

State ex rel. Pugh v. Meredith, 183 Iowa 783, 790, 167 N. W. 626, 628.

In the *Pugh* case, the court refused to invalidate proxies solicited in violation of a statute prohibiting any soliciting of proxies by agents of the company. The court said:

> "One sufficient reason for this holding is that the statute does not expressly or by implication provide for such result * * * The purpose of the statute forbidding such solicitation is not to disfranchise the member or members so solicited, but rather to prohibit and punish the mis-use by agents of their position in the organization to promote the selfish interest of themselves or of others." See also:
>
> *Securities and Exchange Commission v. Okin*, 58 Fed. Supp. 20, 132 F. 2d 784.

Censorship of stockholder's rights to sign proxies is just as abhorrent to the concept of freedom of speech and of the press guaranteed by the first amendment to the Constitution of the United States as is censorship of movies, books, plays, pictures, magazines. *Kingsley Corp. v. Regents of U. of N. Y.*, 360 U. S. 684, 697, 3 L. Ed. 2d 1512, 1521. In that case Mr. Justice Douglas, with whom Mr. Justice Black joins, concurring in a moving picture case, said:

> "While I join in the opinion of the Court, I adhere to the views I expressed in *Superior Films, Inc. v. Department of Education*, 346 U. S. 587, 588, 589, 98 L. ed. 329, 331, 74 S. Ct. 286, that censorship of movies is unconstitutional, since it is a form of 'previous restraint' that is as much at war with the First Amendment, made applicable to the States through the Fourteenth, as the censorship struck down in *Near v. Minnesota*, 283

U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625. If a particular movie violates a valid law, the exhibitor can be prosecuted in the usual way. I can find in the First Amendment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie."

Shall we now add on behalf of the stockholders of America "or censoring proxy material or proxy statements previous to their use by the stockholder or his agent."

Shall we permit "previous restraint" of the letters and writings of those seeking the votes of stockholders or their proxies, any more than we would require the submission to the registrar of voters to censor letters sent out to the voters at an election?

In this same case the court said that it did not consider the appellant's contention that the state is entirely without power to require film of any kind to be licensed prior to their exhibition. We contend that neither Congress nor the Securities and Exchange Commission have the power to require stockholders or their agents to whom they send proxies to secure what amounts to a license to circulate proxy solicitation letters and proxies before they are able to do so.

"The First Amendment says in no equivocal language that Congress shall pass no law abridging freedom of speech, press, assembly or petition."

Barenblatt v. U. S., 360 U. S. 109, 140, 3 L. Ed. 2d 1115, 1137.

For violations of the law there are criminal sanctions just as there are for libel.

Vagueness and Uncertainty of Section 78n(a).

Another important question raised by this petition which has not been passed upon by this court but which this court should determine, is whether Section 78n(a) of Title 15, U. S. Code is so vague as to be unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States. Bearing in mind that this section carries with it criminal penalties for its violation, we must examine it in the light of the cases covering vagueness.

See:

Lanzetta v. New Jersey, 306 U. S. 451, 83 L. Ed. 888;

Winters v. New York, 33 U. S. 507, 515, 92 L. Ed. 840, 849;

Jordan v. De George, 341 U. S. 223, 230, 231, 95 L. Ed. 886, 891, 892;

Musser v. Utah, 333 U. S. 95, 97, 92 L. Ed. 562, 565;

Scull v. Virginia, 359 U. S. 344, 3 L. Ed. 2d 865.

Lack of Due Process on Behalf of Stockholders.

At no time were the stockholders made a party to the proceedings to cancel their proxies. The Securities and Exchange Commission did not make them a party to the action to cancel their proxies and they were not represented by counsel, either individually or in a representative capacity.

Procedural due process of law requires notice and an opportunity to be heard:

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;

Lambert v. California, 355 U. S. 225, 2 L. Ed. 2d 228;

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865;

Covey v. Somers, 351 U. S. 144, 100 L. Ed. 102;

Walker v. Hutchinson, 352 U. S. 112, 1 L. Ed. 2d 178.

The Famous Boyd Case, 116 U. S. 616.

In *Boyd v. United States*, 116 U. S. 616, the Supreme Court of the United States held unconstitutional the seizure and destruction of goods taken by the Government in violation of customs regulations. If the Government could not summarily seize and destroy goods in violation of a statute of the United States, how can it destroy proxies without any statute and without any regulation providing either for notice and an opportunity to be heard to the person who gave the proxy?

Furthermore, the proxies are themselves property and cannot be taken or condemned by the Government, thus disenfranchising the owners or givers thereof.

Holders of shares equal to approximately 1,200,000 votes (sufficient to constitute a practical majority of the votes expected to be cast at the annual meeting) signed and returned the proxies of the Stockholders Protective Committee. Practically none of these proxies were cancelled or withdrawn by the stockholders who gave them. The Securities and Exchange Commission,

without notice to these stockholders and without any participation by the stockholders, sought court action to void the proxies and their petition was granted.

After the judgment of the District Court had been upheld, with modifications by the Court of Appeals, the Stockholders' Protective Committee sought to have the court under its equitable powers permit the Stockholders' Protective Committee to send out letters to all of the stockholders who gave proxies with an explanation of what had happened and ask if the stockholders still wanted to leave their proxies stand or whether they wanted to withdraw or cancel them. This motion was denied by the Circuit Court. We ask this court to review and reverse this order.

Cancellation of proxies, secured at a cost of many thousands of dollars, and not chargeable to the company, is too severe and inequitable, and unjust.

Liberty of Contract Violated.

The action of the Securities and Exchange Commission violated a fundamental provision of constitutional law; namely, liberty of contract which inheres in the First and Fifth Amendments to the Constitution of the United States although it is specifically forbidden to the states in Article I, Section 10 of the Constitution of the United States.

In *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, a corporate charter was held to be a contract and stockholders of a corporation have, in effect,

a contract with the corporation to be allowed to vote or to give their proxy to vote. Section 78n(a) of Title 15 and the regulations pursuant thereto would arbitrarily impair this right, and did so in this case. See also

Louisville, etc., Bank v. Radford, 295 U. S. 555, 79 L. Ed. 1593.

Important Questions for This Court to Decide.

The questions presented by this petition are substantial Federal questions of importance which have not been, but should be, decided by this court. They also present conflicting views of various courts and this court should decide the questions herein to establish uniformity.

Prayer.

Wherefore, petitioners pray that this Honorable Court grant its appropriate writ of certiorari directed to the Court of Appeals for the Ninth Circuit and that it hold:

I.

That Section 78n(a) unconstitutionally delegates its statutory authority to the Securities and Exchange Commission.

II.

That the Securities and Exchange Commission has no jurisdiction to censor proxy material or proxy statements or to control the material sent to or from stockholders by corporations or by other stockholders with whom it is in privity.

III.

That the nullification and cancellation of proxies is unconstitutional and void and that the judgments and orders based thereon are void.

IV.

That Section 78n(a) inherently and as construed and applied in this case violates the First Amendment to the Constitution of the United States, as do the regulations pursuant thereto.

V.

That Section 78n(a) inherently and as construed and applied in this case violates the due process clause of the Fifth Amendment to the Constitution of the United States.

VI.

That Section 78n(a) inherently and as construed and applied in this case constitutes an unlawful and unconstitutional delegation of the powers of Congress to the Securities and Exchange Commission.

VII.

That the remedy imposed by the court, if consitutional, is too severe and inequitable and that correction, and not cancellation, was the equitable and proper remedy.

VIII.

That if the court upholds the constitutionality of the statute and regulations pursuant thereto that it void the stockholders' meeting and allow either the use of proxies already obtained or a letter to go to the givers of the proxies permitting the withdrawal of the proxies in the event that the proxy giver still wishes to do so.

IX.

That the court set a new date for holding a valid stockholders' meeting at which the rights of the stock-

holders and those to whom they have given the proxies herein or to whom they wish to give their proxies may be exercised.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners.

VAUGHAN, BRANDLIN, ROBINSON & ROEMER,

As of Counsel.

APPENDIX A:

Opinion of the United States Court of Appeals for the Ninth Circuit (Officially Reported in 298 F. 2d (Adv.) 641).

United States Court of Appeals for the Ninth Circuit.

Stanley E. Henwood, Richard I. Roemer, Lewis M. Poe, individually, as members of the United Industrial Corporation Stockholders' Protective Committee and as proxies of said Committee, James V. Armogida, Robert G. Ballance, Fred A. Beshara, Nathaniel R. Dumont, Joe L. Foss, William D. Lawry, Elmer M. Luther, Jr., Edward H. McLaughlin, Charles Soderstrom, John A. Steel, Clarence L. Summers, Roy L. Williams, Louis W. Wulfekuhler, Alfred T. Zodda, individually and as members of the United Industrial Corporation Stockholders' Protective Committee, Bernard F. Gira and Herbert J. Petersen, and United Industrial Corporation, a corporation, Defendants and Appellants, vs. Securities and Exchange Commission, Plaintiff and Appellee, and United Industrial Corporation, Defendant and Appellee. No. 17,591. Jan. 17, 1962.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Hamlin, Circuit Judges; and Solomon, District Judge.

Per Curiam:

This action was brought by the Securities and Exchange Commission[1] for alleged violation on the part of appellants of Section 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. §78n(a)) and of

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[1]Hereinafter referred to sometimes as SEC. United Industrial Corporation is sometimes referred to herein as UIC.

Regulation 14, 17 C.F.R. §240.14, promulgated thereunder. Jurisdiction below rested on 15 U.S.C. §78(aa). This court has jurisdiction to review the judgment and permanent restraining order issued below.

In this action, time is of the essence. We have examined with great care the six briefs, with their appendices, which have been filed herein. We have examined with care so much of the voluminous nineteen volume record as was specifically brought to our attention in the briefs and oral argument, and which we deem necessary for an understanding of the action.

We hold that there exists sufficient evidence in the record to affirm some, but not all, of the findings of fact and conclusions of law based thereon made by the trial judge. We therefore modify the judgment rendered below to read as follows:

"I.

"IT IS ORDERED, ADJUDGED AND DECREED that the defendants United Industrial Corporation Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe, individually and as members of and proxies for said Stockholders' Protective Committee, associates, substitutes, agents, employees and attorneys of said Stockholders' Protective Committee, and the defendants Bernard F. Gira and Herbert J. Petersen, their agents, employees, and attorneys, and all persons acting in concert or participation with any of said defendants, be and they hereby are permanently restrained and enjoined from, directly or indirectly, making use of the mails or any means or instrumentality of interstate commerce or of any facility of any national securities

exchange to solicit or to permit the use of their names to solicit any proxy in respect of the common or preferred stock of UIC, or otherwise soliciting any such proxy, by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which at the time and in the light of the circumstances under which it is made is false and misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading, or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy which has been or has become false or misleading, including the following:

(i) omitting to state that the defendants Bernard F. Gira and Herbert J. Petersen were either directly or indirectly instrumental in initialing the UIC Stockholders' Protective Committee and in securing one or more of the slate of directors for membership on the board of directors of UIC, in opposition to the slate of directors formulated by the management of UIC;

(ii) omitting to state that the defendants Bernard F. Gira and Herbert J. Petersen have participated with representatives of the Stockholders' Protective Committee and aided said Committee and its representatives in conducting proxy solicitations in opposition to the management of UIC;

(iii) stating that the defendants Bernard F. Gira and Herbert J. Petersen are not participating with the Stockholders' Protective Committee

in soliciting proxies in opposition to the management of UIC;

(iv) stating that the formation of the Stockholders' Protective Committee was initiated solely as a result of complaints of the defendants Elmer M. Luther, Jr. and Roy L. Williams;

(v) stating that certain losses sustained by UIC and diminution of stockholders' equity occurred during the time that Bernard F. Fein was Chairman of the Executive Committee;

or voting any proxy of any stockholder of UIC now held by the defendants UIC Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer or Lewis M. Poe as proxies for said Committee, or any substitute for any such proxy holder or voting any such proxy which is not received pursuant to a solicitation made subsequent to the entry of this decree, in accordance with Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a), and Regulation 14, 17 C.F.R. 240.14.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants Bernard F. Gira and Herbert J. Petersen shall and they hereby are commanded to comply with Rule 14a-11 of Regulation 14, 17 C.F.R. 240.14a-11, by filing with the Securities and Exchange Commission and with each national securities exchange upon which the common or preferred stock of United Industrial Corporation is registered a correct statement in duplicate containing the information specified by Schedule 14B of Regulation 14, concerning their

participation in the solicitation of proxies in respect of the common and preferred stock of UIC.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant United Industrial Corporation, its officers, directors, employees, and attorneys, and each of them, be and they hereby are restrained and enjoined from holding any meeting of stockholders of United Industrial Corporation, except for the purpose of adjournment, until sixty days after this decree becomes final.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed, without prejudice, as to the defendants James V. Armogida, Robert G. Ballance, Fred A. Beshara, Nathaniel R. Dumont, Joe L. Foss, William David Lawry, Elmer M. Luther, Jr., Edward H. McLaughlin, Charles Soderstrom, John Autry Steel, Clarence L. Summers, Roy L. Williams, Louis W. Wulfekuhler and Alfred T. Zodda, individually and as members of the United Industrial Corporation Stockholders' Protective Committee."

We agree with the findings of fact in part only. In view of the fact, however, that no stockholders' meeting of the United Industrial Corporation has been held for some months, pending determination of this litigation, we refrain from elaborating on the deficiencies of the findings.

As hereinabove modified, the judgment is *affirmed*.

(Endorsed) Per Curiam Opinion Filed Jan. 17, 1962.
Frank H. Schmid, Clerk.

APPENDIX B.

Section 78aa. Jurisdiction of Offenses and Suits.

The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts. June 6, 1934, c. 404, Sec. 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921, June 25, 1948, c. 646, Sec. 32 (b), 62 Stat. 991; May 24, 1949, c. 139, Sec. 127, 63 Stat. 107.

APPENDIX C.

Section 78n. Proxies.

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

APPENDIX D.

Rule 14, Securities and Exchange Commission.

"No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

"Note. The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

"(a) Predictions as to specific future market values, earnings, or dividends.

"(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper illegal or immoral conduct or associations, without factual foundation.

"(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

"(d) Claims made prior to a meeting regarding the results of a solicitation."

Regulation 14(a)-11 Under the Securities and Exchange Act of 1934:

"Rule 14a-11. Special Provisions Applicable to Election Contests.

"(a) Solicitations to which this rule applies.

"This rule applies to any solicitation subject to this regulation by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders.

"(b) Participant or Participant in a Solicitation.

"For purposes of this rule the term 'participant' and 'participant in a solicitation' include the following:

"(1) the issuer;

"(2) any director of the issuer, and any nominee for whose election as a director proxies are solicited;

"(3) any committee or group which solicits proxies, any member of such committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly, take the initiative in organizing, directing or financing any such committee or group;

"(4) any person who finances or joins with another to finance the solicitation of proxies, except persons who contribute not more than $500 and who are not otherwise participants;

"(5) any person who lends money or furnishes credit or enters into any other arrangements, pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities of the issuer

by any participant or other persons, in support of or in opposition to a participant; except that such terms do not include a bank, broker or dealer who, in the ordinary course of business, lends money or executes orders for the purchase or sale of securities and who is not otherwise a participant;

"(6) any other person who solicits proxies: *Provided, however,* That such terms do not include (i) any person or organization retained or employed by a participant to solicit security holders, or any person who merely transmits proxy soliciting material or performs ministerial or clerical duties; (ii) any person employed by a participant in the capacity of attorney, accountant, or advertising, public relations or financial adviser, and whose activities are limited to the performance of his duties in the course of such employment; (iii) any person regularly employed as an officer or employee of the issuer or any of its subsidiaries who is not otherwise a participant; or (iv) any officer or director of, or any person regularly employed by, any other participant, if such officer, director, or employee is not otherwise a participant.

"(c) Filing of Information Required by Schedule 14B.

"(1) No solicitation subject to this rule shall be made by any person other than the management of an issuer unless at least five business days prior thereto, or such shorter period as the Commission may authorize upon a showing of good cause therefor, there has been filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant in such solicitation, a statement in

duplicate containing the information specified by Schedule 14B.

"(2) Within five business days after a soliciation subject to this rule is made by the management of an issuer, or such longer period as the Commission may authorize upon a showing of good cause therefor, there shall be filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant in such solicitation, other than the issuer a statement in duplicate containing the information specified by Schedule 14B.

"(3) If any solicitation on behalf of management or any other person has been made, or if proxy material is ready for distribution, prior to a solicitation subject to this rule in opposition thereto, a statement in duplicate containing the information specified in Schedule 14B shall be filed by or on behalf of each participant in such prior solicitation, other than the issuer, as soon as reasonably practicable after the commencement of the solicitation in opposition thereto, with the Commission and with each national securities exchange on which any security of the issuer is listed and registered.

"(4) If, subsequent to the filing of the statements required by subparagraphs (1), (2), and (3) above, additional persons become participants in a solicitation subject to this rule, there shall be filed, with the Commission and each appropriate exchange, by or on behalf of each such person a statement in duplicate containing the information specified by Schedule 14B, within three business days after such person becomes a participant, or such longer period as the Commission may authorize upon a showing of good cause therefor.

"(5) If any material change occurs in the facts reported in any statement filed by or on behalf of any participant, and appropriate amendment to such statement shall be filed promptly with the Commission and each appropriate exchange.

"(6) Each statement and amendment thereto filed pursuant to this paragraph (c) shall be part of the official public files of the Commission and for purposes of this regulation shall be deemed a communication subject to the provisions of Rule 14a-9.

"(d) Solicitations Prior to Furnishing Required Written Proxy Statement.

"Notwithstanding the provisions of Rule 14a-3 (a), a solicitation subject to this rule may be made prior to furnishing security holders a written proxy statement containing the information specified in Schedule 14A with respect to such solicitation, *Provided* That—

"(1) The statements required by paragraph (c) of this rule are filed by or on behalf of each participant in such solicitation.

"(2) No form of proxy is furnished to security holders prior to the time the written proxy statement is required by Rule 14a-3 (a) is furnished to security holders: *Provided, however,* That this subparagraph (2) shall not apply where a proxy statement then meeting the requirements of Schedule 14A has been furnished to security holders.

"(3) At least the information specified in Items 2-(a) and 3(a) of the statement required by paragraph (c) to be filed by each participant; or an appropriate summary thereof, is included in each communication sent or given to security holders in connection with the solicitation.

"(4) A written proxy statement containing the information specified in Schedule 14A with respect to a solicitation is set or given security holders at the earliest practicable date.

"(e) Solicitations prior to furnishing required written proxy statement—Filing Requirements.

"Three copies of any soliciting material proposed to be sent or given to security holders prior to the furnishings of the written proxy statement required by Rule 14a-3 (a) shall be filed with the Commission in preliminary form, at least five business days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period as the Commission may authorize upon a showing of good cause therefor.

(f) Application of this rule to Annual Report.

Notwithstanding the provisions of Rule 14a-3 (b) and (c), three copies of any portion of the annual report referred to in Rule 14a-3 (b) which comments upon or refers to any solicitation subject to this rule, or to any participant in any such solicitation, other than the solicitation by the management, shall be filed with the Commission as proxy material subject to this regulation. Such portion of the annual report shall be filed with the Commission in preliminary form at least five business days prior to the date copies of the report are first sent or given to security holders.

"(g) Application of Rule 14a-6.

"The provisions of paragraphs (c), (d), (e), (f) and (g) of Rule 14a-6 shall apply to the extent pertinent to soliciting material subject to paragraphs (e) and (f) of this Rule 14a-11.

"(h) Use of reprints or reproductions.

"In any solicitation subject to this rule, solicitating material which includes, in whole or part, any reprints or reproductions of any previously published material shall:

"(1) State the name of the author and publication, the date of prior publication, and identify any person who is quoted without being named in the previously published material.

"(2) Except in the case of a public official document or statement, state whether or not the consent of the author and publication has been obtained to the use of the previously published material as proxy soliciting material.

"(3) If any participant using the previously published material, or anyone on his behalf, paid, directly or indirectly, for the preparation or prior publication of the previously published material, or has made or proposes to make any payments or give any other consideration in connection with the publication or republication of such material, state the circumstances."

APPENDIX E.

Motion for Modification of Judgment and Order Incorporating Affidavit of J. J. Brandlin by Reference.

United States Court of Appeals for the Ninth Circuit.

Stanley E. Henwood, et al., Appellants, vs. Securities and Exchange Commission, et al., Appellees. No. 17,-591.

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COMES NOW the defendants and appellants above named and move this Honorable Court to modify its judgment and order affirming a judgment of the District Court voiding all the proxies heretofore secured by the above named defendants and requesting this court to allow the proxies to stand provided the stockholders who gave the proxies are notified as to the additional matter which the court stated should have

been contained in statements to them heretofore sent. The movants set forth as grounds herein that the voiding of the proxies without further opportunity to correct the omission found by the District Court is too severe, too costly and inequitable; that in injunctive process you never go beyond the necessities of the case and only to the extent required to preserve the rights of all parties.

Enos v. Harmon, 157 Cal. App. 2d 746, 321 P. 2d 810

Anderson v. Souza, 243 P. 2d 947

Sontag Chain Stores Company v. Superior Court, 18 Cal. 2d 92, 28 Am. Jur. 485.

Injunction is an equitable remedy and should be administered with equitable principles. Although injunction is the strong arm of equity, it should be administered only with the strength required to do equity and justice. This can be accomplished by modifying the order to permit sending out the additional information set out in the court's opinion and pursuant to the affidavit of J. J. BRANDLIN attached hereto and made a part hereof as though fully set out.

This motion is based upon all the records and files and proceedings heretofore had and the affidavit of J. J. BRANDLIN incorporated herein as though fully set out.

WHEREFORE defendants and appellants move this Honorable Court to modify the judgment by omitting the nullification of the proxies and req.. ing only that

the STOCKHOLDERS' PROTECTIVE COMMITTEE convey to the stockholders that information contained in this court's per curiam decision.

Dated this 8th day of February, 1962.

Respectfully submitted,

/s/ Mark Robinson
MARK ROBINSON

/s/ Morris Lavine
MORRIS LAVINE

Attorneys for Defendants and Appellants.

AFFIDAVIT
OF
J. J. BRANDLIN

United States Court of Appeals for the Ninth Circuit.

Stanley E. Henwood, et al., Defendants and Appellants, vs. Securities and Exchange Commission, Plaintiff and Appellee, and United Industrial Corporation, Defendant and Appellee. No. 17,591.

State of California, County of Los Angeles—ss.

J. J. BRANDLIN, being first duly sworn, deposes and says:

That he is an attorney at law, admitted to practice in the State of California and before the United States District Court for the Southern District of California and the United States Court of Appeals for the Ninth

Circuit; that he is a partner in the law firm of Vaughan, Brandlin, Baggot, Robinson & Roemer and one of the attorneys of record for the defendants known as the Stockholders' Protective Committee; that the Committee is composed of approximately 17 members, the names of which are known to the Appellate Court pursuant to the appeal which has already been heard and ruled upon in the above captioned matter.

That as was previously pointed out to the Court, this action centered around a proxy contest in which the aforementioned Stockholders' Protective Committee was contesting with the present Management of United Industrial Corporation for election to the Board of Directors of said corporation. The Stockholders' Protective Committee had accumulated over 1,200,000 votes, which were sufficient to constitute a majority of the number of votes likely to be cast at the annual meeting set for July 27, 1961. That in order to accumulate these votes, it was necessary to prepare, submit for comment of the Securities and Exchange Commission, and to print and mail the four solicitations which formed the basis of this action, and to perform other actions pertaining to the solicitation of proxies; all of which include the following:

a. Deliver the material to brokers, and make arrangements and pay for their transmittal to their customers, whose shares are held in "street names";

b. Employ and pay for a professional solicitor to arrange to obtain broker votes;

c. Conduct a long-distance telephone campaign throughout the country to obtain proxies not received by the mailing solicitations;

d. Tabulate proxies.

That the cost of preparing, printing and mailing the solicitation material in this proxy contest has already exceeded $35,000.00, which figure excludes all expenses and disbursements related to litigation incident to the proxy contest, including the appellate matters. Your affiant's law firm has performed many of the functions above described. The reasonable value of its services, also exclusive of services rendered in connection with any litigated matters, including appeals, exceeds the sum of $65,000.00.

In the event the proxies already obtained by the Stockholders' Protective Committee are invalidated, it is your affiant's opinion that because of the passage of time since the original solicitations, and the aggressive opposition of Management, that at least 3 new solicitations will be required to rekindle stockholders' interest to the extent of affirmatively re-executing proxies; the cost of such resolicitation could reasonably be expected to approximate the amount already expended as indicated above.

That affiant verily believes that a more practical method of accomplishing the same purpose as is embodied in the per curiam opinion of this Court would be to modify the present per curiam decision to permit the dissemination on the part of the Protective Committee of an additional letter to the stockholders, conveying to the stockholders the information embodied in subsections (i), (ii), (iii), (iv) and (v) of I, but at the same time permitting the Stockholders' Protective Committee to retain the proxies already solicited which are, of course, subject to revocation by any stockholder by merely signing a proxy on behalf of Management or by appearing at the meeting and voting in person; That the cost to the Stockholders' Protec-

tive Committee of such a proposal would be less than $10,000.00.

That the information required to be conveyed to the stockholders by the per curiam decision in order to correct any statements in any earlier communications or to make any earlier communications not false and misleading can be done quite simply in view of the information already conveyed to the stockholders by previous solicitation material of the appellant.

DATED: February 7, 1962.

/s/ J. J. BRANDLIN

Subscribed and Sworn to before me this 7th day of February, 1962.

/s/ MARY SUGAMURA,
Notary Public in and for said
County and State

MARY SUGAMURA
My Commission Expires May 14, 1965.

APPENDIX F.

Affidavit of Brigadier General Robert G. Ballance (U.S.M.C., Retired).

In the Supreme Court of the United States, October Term, 1961.

Stanley E. Henwood, et al., Defendants and Appellants, vs. Securities and Exchange Commission, Plaintiff and Appellee, and United Industrial Corporation, Defendant and Appelle. No. .....

State of California, County of Los Angeles—ss.

BRIGADIER GENERAL ROBERT G. BALLANCE, being first duly sworn, deposes and says:

(1) That he is a member of the Stockholders' Protective Committee of United Industrial Corporation and the owner of 1,400 shares of its common stock, all purchased prior to March 17, 1959.

(2) That he was a defendant in the above-entitled matter and is one of the appellants herein.

(3) That on June 7, 1961, he executed a blue proxy giving his proxies to the Stockholders' Protective Committee to be voted at the next annual meeting of United Industrial Corporation for the slate of directors proposed by said Stockholders' Protective Committee in opposition to the slate proposed by the present Management.

(4) That his said proxy was invalidated by an order of the United States District Court, Central Division, for the Southern District of California, in the above-entitled case.

(5) That at no time prior to said order, or since, has affiant authorized anyone to revoke or invalidate his proxy; nor is it affiant's intention or wish that said proxy be revoked or invalidated.

/s/ ROBERT G. BALLANCE,
Brigadier General Robert G. Ballance.

Subscribed and sworn to before me this 30th day of April, 1962.

/s/ MARY SUGAMURA,
Notary Public in and for said County and State.

MARY SUGAMURA
My Commission Expires May 14, 1965.

APPENDIX G.

Affidavit of Richard I. Roemer.

In the Supreme Court of the United States, October Term, 1961.

Stanley E. Henwood, et al., Defendants and Appellants, vs. Securities and Exchange Commission, Plaintiff and Appellee, and United Industrial Corporation, Defendant and Appellee, No. .....

State of California, County of Los Angeles—ss.

RICHARD I. ROEMER, being first duly sworn, deposes and says:

(1) That he is a member of the Stockholders' Protective Committee and a defendant and appellant herein.

(2) That upon receiving information that United Industrial Corporation intends to hold its 1962 annual meeting on May 9, 1962, affiant prepared and caused to be prepared certain proxy soliciting material which was mailed to the Securities and Exchange Commission on April 19, 1962, for their comment, pursuant to the Rules and Regulations promulgated under the Securities and Exchange Act of 1934.

(3) That on April 24, 1962, affiant received a telegram signed by Mr. Abraham Zwerling, Assistant Director, Division of Corporation Finance, advising affiant that the said proxy material should not be used and that a letter followed.

(4) That on April 25, 1962, affiant telephoned Mr. Abraham Zwerling, Assistant Director, Division of Corporation Finance. Mr. Zwerling advised affiant that it would be necessary for the Stockholders' Pro-

tective Committee to file a new proxy statement and revised Schedule 14B's concerning participants in the proxy contest and further advised affiant that the letter referred to in said telegram had not been completed as yet.

(5) That Mr. Zwerling asked affiant why the Stockholders' Protective Committee had waited so long before submitting its proxy material. Affiant stated that the Committee did not anticipate that the meeting would take place, since the Judgment in the above-entitled case had not become final and the Court of Appeals for the Ninth Circuit had ruled that no stockholders' meeting of any kind, except for adjournment, could be held until 60 days after the Judgment in the case at bar became final.

(6) That this conversation ended on the basis that the Securities and Exchange Commission did not agree that the meeting was improper and that before the appellants herein could solicit proxies, a complete revised proxy statement and Schedule 14B's would have to be filed, as well as revising the material heretofore submitted for comment.

(7) That on April 26, 1962, affiant again telephoned Mr. Zwerling for the purpose of reviewing affiant's position with regard to the pending annual meeting of United Industrial Corporation. Affiant stated that it was a physical impossibility for the Stockholders' Protective Committee to complete and process the documents necessary to solicit proxies for said 1962 meeting, in that there was insufficient time to accomplish the minimum requirements, as well as insufficient time to mail proxies and proxy material and allow for return of the proxies by those stockholders who wish to vote for the slate proposed by the Stockholders' Pro-

tective Committee. Mr. Zwerling agreed that it was a practical impossibility to complete the required work in time to properly solicit proxies for the annual meeting on May 9, 1962.

(8) That affiant stated to Mr. Zwerling that the present members of the Stockholders' Protective Committee, all stockholders of United Industrial Corporation, wished to continue soliciting the stockholders of said corporation for their proxies.

(9) That affiant stated that it was his opinion that not only was the meeting presently set for May 9, 1962, improperly called, but, further, that the Stockholders' Protective Committee had been induced to believe that such a meeting would not take place for the following reasons:

(a) That as of April 24, 1962, the mandate from the Court of Appeals for the Ninth Circuit had not been issued. That the appellants' petition for rehearing was denied on February 28, 1962. That under Rule 26 of the Rules of the Court of Appeals for the Ninth Circuit, the mandate would be due to issue on or about March 5, 1962; but in fact it did not issue. That the opinion of the Court of Appeals dated January 17, 1962, modified the judgment herein and stated that:

> ". . . . the defendant United Industrial Corporation, its officers, directors, employees, and attorneys, and each of them, be and they hereby are restrained and enjoined from holding any meeting of stockholders of United Industrial Corporation, except for the purpose of adjournment, until sixty days after this decree becomes final."

Hence, the Stockholders' Protective Committee believes that the meeting set for May 9, 1962, is in violation of said court order.

(b) In a mailing to stockholders of United Industrial Corporation dated March 6, 1962, Bernard Fein, President, stated:

> "The Court of Appeals has ordered that the adjourned annual meeting be held not earlier than sixty days after its decree becomes final. It is therefore not possible at this time to advise stockholders of the precise date on which the annual meeting will be held."

(10) That in regard to the last quoted statement from Management's letter of March 6, 1962, Mr. Zwerling stated that said quote referred to the "adjourned annual meeting" and that the meeting now set for May 9, 1962, is the 1962 annual meeting. Affiant stated to Mr. Zwerling that, in his opinion, this made the statement more false and misleading by reason of the fact that Management obviously never intended to hold the "adjourned annual meeting" and that the statement in the letter clearly implies that the meeting will be held at some future date. Mr. Zwerling stated that the paragraph in the letter quoted above was "unfortunate."

(11) That affiant then stated to Mr. Zwerling that Management's proxy statement for the 1962 annual meeting states, in effect, that there is no proxy contest in progress and that the Securities and Exchange Commission states that there is a proxy contest in progress and that the Commission did not agree with the statement in Management's 1962 proxy statement and termed that statement also "unfortunate."

(12) That affiant then requested Mr. Zwerling to request Management to continue the meeting set for May 9, 1962, for an additional 30 days, to the second

week in June, 1962, in order to give the Stockholders' Protective Committee time to properly solicit the proxies of the stockholders of the corporation. Affiant pointed out that the present situation was analogous to a situation that took place in Wilmington, Delaware, in April, 1961, wherein the Stockholders Protective Committee filed an action in the Court of Chancery, entitled *Dumont, et al. v. United Industrial Corporation,* the purpose of which was to obtain an injunction compelling Management to hold the annual meeting for 1961, pursuant to the By-Laws of the corporation. The Securities and Exchange Commission intervened in that matter in support of Management's contention that the 1961 meeting should be continued. Mr. Zwerling stated that this intervention was on the basis that the stockholders had not received adequate financial information about the company and that the present situation was, therefore, not analogous. Affiant stated that, in his opinion, this was not an ordinary situation and that the proxy contest involved herein was probably one of the longest and most bitterly fought in history. Mr. Zwerling agreed and stated that this was not an ordinary situation.

(13) Mr. Zwerling then asked affiant whether affiant wanted the Securities and Exchange Commission to file a lawsuit against Management to have the meeting adjourned. Affiant stated that this should be done only as a last resort, but that it should be done if the Commission was not able to persuade Management to voluntarily continue the meeting. Mr. Zwerling said that he would take the matter up with the General Counsel and would telephone affiant at a later date.

(14) On April 27, 1962, affiant received a tele-

phone call from Mr. Zwerling wherein Mr. Zwerling advised affiant that the General Counsel saw no basis for taking any action on this matter.

/s/ RICHARD I. ROEMER,

Subscribed and Sworn to before me this 30th day of April, 1962.

/s/ MARY SUGAMURA,
Notary Public in and for said County and State.

MARY SUGAMURA
My Commission Expires May 14, 1965.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~994~~ 131

STANLEY E. HENWOOD, RICHARD I. ROEMER and LEWIS M. POE, individually and as members of the United Industrial Corporation Stockholders' Protective Committee and as proxies of said Committee,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,
Respondents.

BRIEF OF RESPONDENT UNITED INDUSTRIAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK G. RAICHLE,
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Buffalo 3, New York,
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United Industrial Corporation.

RAICHLE, MOORE, BANNING AND WEISS,
RALPH L. HALPERN,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 994

STANLEY E. HENWOOD, RICHARD I. ROEMER and LEWIS M. POE, individually and as members of the United Industrial Corporation Stockholders' Protective Committee and as proxies of said Committee,

Petitioners.

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,

Respondents.

BRIEF OF RESPONDENT UNITED INDUSTRIAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of an order of the Court of Appeals for the Ninth Circuit which modified* and affirmed the judgment of the United States District Court for the Southern District of California invalidating proxies obtained by petitioners through the use of false and misleading proxy solicitation material with respect to the *1961* annual stockholders' meeting of the respondent United Industrial Corporation (hereinafter referred to as "United" or the "Company").

* In particulars not here pertinent.

Petitioners' application to stay the issuance of the mandate was denied by the Court of Appeals for the Ninth Circuit on April 24, 1962. Their petition for rehearing had been denied on February 28, 1962. Petitioners' applications to restrain the holding of the 1962 annual meeting of United were denied on April 30, 1962 by the Court of Appeals and on May 8, 1962 by Mr. Justice Douglas. Such 1962 meeting was accordingly held on May 9, 1962, the date fixed by the Company's by-laws.

Opinions Below

The memorandum opinion, findings of fact, and conclusions of law of the United States District Court for the Southern District of California are reported in CCH Fed. Sec. L. Rep. ¶ 91,125. The opinion of modification and affirmance of the Court of Appeals for the Ninth Circuit is printed in Appendix A annexed to the petition and is reported in 298 F. 2d 641.

Jurisdiction

The petitioners invoke the jurisdiction of this Court under 28 U. S. C. § 1254(1). The jurisdiction of the District Court was invoked under 15 U. S. C. § 78aa.

Questions Presented

The basic questions presented by the petition may be summarized as whether the delegation of authority by the Congress to the Securities and Exchange Commission to promulgate "proxy rules" by Section 14 of the Securities Exchange Act of 1934, 15 U. S. C. § 78n, and the promulgation of such rules, Regulation 14A, 17 C. F. R. § 240.14a, are unconstitutional either on their face or as applied to

this case. Such issues were not raised before the Trial Court but were attempted to be raised for the first time before the Court of Appeals.

The petition also raises the question whether the stockholders of the respondent United are indispensable parties. This question was not raised before either Court below.

Counter-statement of the Facts

This is an action instituted by the Securities and Exchange Commission pursuant to the provisions of Section 21(e) and Section 21(f) of the Securities Exchange Act of 1934, 15 U. S. C. § 78u(e) and § 78u(f). The complaint (C. T. 2)* recites that the defendants, other than the defendant United, have engaged or are about to engage in acts and practices in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a) and of Regulation 14A, 17 C. F. R. § 240.14a, prescribed by the Securities and Exchange Commission to govern the solicitation of proxies in respect of any security registered and listed on any national securities exchange. The complaint charges that the petitioners, individually and as members of the United Industrial Corporation Stockholders' Protective Committee (hereinafter referred to as the "Committee"), have solicited proxies for use at the 1961 annual stockholders' meeting of United by means of statements which were false and misleading with respect to material facts and which *omitted* to state material facts. It specifies the failure of such proxy statements to disclose the part played by the defendants Gira, Petersen and Yaras in the initiation and organization of the Committee and

*C. T. refers to Volume I of the Transcript of the Record (Clerk's Transcript).

their participation in the proxy solicitation in opposition to the existing management of the Company (C. T. 2).

United is incorporated under the laws of the State of Delaware and is an industrial complex engaged in the operation of various businesses through wholly owned subsidiaries and divisions located throughout the United States (Exs. 14; LL). It resulted from the merger on December 31, 1959 of United Industrial Corporation, an old line Michigan corporation, the stock of which had for many years been listed on the New York Stock Exchange, and Topp Industries Corporation, a corporation which had originally been organized in the State of California in 1951 by the defendants Gira and Petersen and which was engaged principally in the electronics industry (Exs. 14; LL). All of the business and assets of Topp Industries Corporation, a Delaware corporation, were prior to October, 1959 owned and operated by Topp Industries, Inc., a California corporation (Ex. LL). Upon the consummation of the merger, the operation of United was vested in the former principals of both Topp corporations (Ex. 14). The defendant Gira, the former president of both Topp corporations, became the president and chief executive officer of United and the defendant Petersen, the former vice-president of both Topp corporations, became the executive vice-president of United (Exs. 14; LL). The board of directors was divided between the former directors of Topp Industries and former directors of the old United Industrial Corporation. The common stock of the Company, of which more than 2,000,000 shares were outstanding, was listed for trading on the New York Stock Exchange and the preferred stock, of which over 1,000,000 shares were outstanding, was listed for trading on the American Stock Exchange. (Exs. 14; LL). Warrants were also listed on the American Stock

Exchange. All these securities in addition were listed on the Pacific Coast Stock Exchange (Ex. LL).

After consummation of the merger Gira and Petersen gradually moved the executive offices of the Company to Los Angeles, which had been the principal place of business of Topp Industries, Inc., and thereafter the operations of the Company were conducted from these offices (Ex. LL). For the year ended December 31, 1960, the first fiscal year of its operations, the Company showed an operating loss in excess of $6,000,000 (Exs. 13, 14). Early in January of 1961 Arthur Young & Co., the Company's independent accountants, made a direct request to the board of directors that they be accorded an opportunity to appear before the board and disclose information which had come to their attention requiring very substantial write-downs in the Company's assets, occasioned by material misstatements which had been made by officers of the Company in the interim financial statements, and the evaluation by officers of the Company of certain inventories and deferred charges. A meeting of the board of directors was held in Los Angeles on January 12, 13 and 14, 1961 (R. 17).* At the conclusion of this meeting the board asked for and received the resignation of the defendants Gira and Petersen as officers and directors of the Company (R. 61; Ex. 14A; Ex. 33, p. 190). By order of the board of directors the preliminary findings of the independent accountants were made known to the Securities and Exchange Commission, the New York Stock Exchange, and to the financial institutions which had financed the Company (Ex. 14A). As a result of these disclosures trading in both the common and preferred stock of the Company was suspended (Exs. 13, 14A). (Over-the-counter trading was re-

* R. refers to Volume II of the Transcript of the Record (Reporter's Transcript).

sumed on September 22, 1961 (C. T. 236). Trading of the Company's securities was resumed on the Pacific Coast Stock Exchange on November 16, 1961).

As a consequence of these occurrences eight stockholders derivative actions have been instituted against the Company and its former and present directors in the Courts of the State of Delaware and the Courts of the State of New York (Ex. 14). The Company has also instituted an action in the Courts of the State of Delaware against Gira and Petersen and others (Ex. 14). The annual meeting of the Company is appointed by its by-laws to be held on the second Wednesday in May of each year (Ex. 14A). The Rules and Regulations of the Securities and Exchange Commission require that the Company's annual report be furnished the stockholders at or prior to the time proxy solicitation is undertaken by the management in connection with the annual meeting. Rule 14A-3 (b), 17 CFR § 240.14a-3 (b). As a result of the conditions which were reflected in the preliminary findings reported by the Company's auditors, Arthur Young & Co. was unable to complete the annual audit and furnish certified financial statements until long after the date appointed for the 1961 annual meeting (Ex. 14). Seeking to take advantage of this circumstance and to regain control of the Company the defendants Gira and Petersen caused the formation of the so-called Stockholders' Protective Committee whose members are named as defendants in this action. The formation of this Committee, the proxy solicitation it has undertaken and the participation of the defendants Gira and Petersen formed the subject matter of this action.

Early in April of 1961 (Ex. 13) the Committee, having filed incomplete and misleading statements with the Securities and Exchange Commission, mailed to the stockhold-

ers of the Company proxy solicitation material using a stockholders list which had been surreptitiously taken from the Company by Gira and Petersen (R. 78, 280, 355, 1182, 1250, 1251, 1252, 1253). This stockholders list was the only list available to the Company (R. 169). The falsity of the Committee's proxy material, the misrepresentations which it contained and the material facts it omitted were fully developed on the trial of this action. Knowing full well that the management of the Company was foreclosed from soliciting proxies by virtue of the Securities and Exchange Commission regulations and the unavailability of the audited annual report, the Committee instituted an action in the Court of Chancery for the State of Delaware to enjoin any postponement of the 1961 annual meeting and thus assure the success of their attempt to regain control of the Company (R. 1290). The Securities and Exchange Commission expressed its view by letter to the Chancellor in such action on behalf of United and voiced its objection to this attempted perversion of its regulations. After a hearing on the merits the Delaware Court of Chancery denied the relief sought by the Committee and sanctioned the necessary adjournment of the 1961 annual meeting.

Upon the dissemination of the false and misleading proxy statement the Company acted promptly to protect the interest of its stockholders. On April 25, 1961, some three months prior to the commencement of the instant case, it instituted an action in the United States District Court for the Western District of New York against these same defendants with the exception of the defendants Yaras and Shafer (C. T. 272). The complaint (C. T. 272) in the corporate action, just as the complaint in the case at bar (C. T. 2), charged that the defendants solicited

proxies for use at the 1961 annual meeting by false and misleading statements with respect to material facts and by omitting in their proxy statements certain material facts. The complaint in the corporate action (C. T. 272) went on to specify failure of the defendants' proxy material to disclose the connection of Gira and Petersen with the solicitation and their relationship with various members of the so-called Stockholders' Committee and other participants in the solicitation. An injunction was sought to prevent the defendants from voting the proxies that they had obtained and from continuing to solicit proxies by false and misleading statements (C. T. 272).*

Final judgment in the case at bar was entered by the District Court on October 18, 1961. The petitioners obtained a stay pending the hearing and determination of their appeal from the District Court's judgment. After some delay and motions by the petitioners for additional time, the argument of the appeal herein came on to be heard before the Court of Appeals for the Ninth Circuit on January 12, 1962. Such Court on January 17, 1962 in a *per curiam* opinion, reported at 298 F. 2d 641, modified the judgment of the District Court and as so modified affirmed the District Court's judgment. The petitioners, twenty-seven days later, petitioned the Court of Appeals for the Ninth Circuit for a rehearing and filed a motion for modification of the judgment. On February 28, 1962 such Court denied the petition for rehearing and the motion for modification of the judgment.

Through the proceedings hereinabove referred to petitioners succeeded in preventing this publicly held Com-

* Findings similar to those made in the case at bar were made in this private litigation on February 8, 1962 by Judge John W. Holland, sitting by assignment in the United States District Court for the Southern District of California after venue had been changed. The judgment of the Court is reported in CCH Fed. Sec. L. Rep. ¶ 91,142. Certain of the defendants have filed a notice of appeal therefrom.

pany from holding its 1961 annual meeting of stockholders. The proxies solicited by the petitioners were solicited for the annual meeting of stockholders called in 1961. The management also solicited, and at great expense, proxies for said meeting, but was unable to use the same because petitioners prevented the holding of the 1961 annual meeting. As stated before, the by-laws of this Delaware corporation fix the second Wednesday in May of each year for the date of the annual meeting (Ex. 14A). Therefore, on April 10, 1962 the board of directors called for the date appointed by the aforementioned by-law the 1962 annual stockholders' meeting and caused notice thereof to be given to the stockholders. Said notice and the accompanying proxy statement all pertain to the annual meeting of 1962 and not the annual meeting of 1961.

On April 24, 1962 petifioners moved the Court of Appeals for the Ninth Circuit for an order restraining United from holding the 1962 annual meeting and for a further order staying the mandate pending the filing, consideration and disposition by this Court of a petition for a writ of certiorari. By order dated and filed the same day that Court denied the relief sought by the petitioners and stated that its January 17, 1962 "decision became final on Mareh 5, 1962, but through inadvertence the mandate" had not yet issued. The Court further ordered the mandate to issue forthwith. Such order of the Court of Appeals is annexed hereto as Appendix A. It is significant to note that in this same order the Court of Appeals for the Ninth Circuit stated that:

> "• • • This case is not one likely under the practice of the Supreme Court to be taken up by the Court on certiorari."

On April 30, 1962 petitioners moved the Court of Appeals for the Ninth Circuit for an order punishing United and its

president for an alleged violation of that Court's order with respect to the solicitation of proxies for, and the calling of, the 1962 annual meeting. The Court obviously took notice of the fact that the within action had reference to the 1961 annual meeting and denied any such relief in an order handed down the same day. A copy of said order is annexed hereto as Appendix B.

Thereafter petitioners moved before Mr. Justice Douglas for an order restraining United from holding the 1962 annual meeting. Such application was denied by Mr. Justice Douglas on May 8, 1962.

Accordingly, the 1962 annual meeting of stockholders was held as scheduled on May 9, 1962 in Wilmington, Delaware. At such 1962 annual meeting 68% of the common and 72% of the preferred stock voted for the management slate. Since these votes represented proxies rescinding all prior proxies it is clear that a substantial portion of the proxies held by the Committee was revoked. A copy of the president's report to United's stockholders dated May 21, 1962 is annexed hereto as Appendix C.

In addition it should be pointed out that the proxies received by the Committee were of stockholders as of December 30, 1960, the date of the stockholders list from which the Committee solicited. With a substantial amount of trading having taken place in United's securities, it is obvious that as of April 9, 1962, the record date for the stockholders entitled to vote at the meeting held on May 9, 1962, the stockholders were substantially different from those that the Committee solicited.*

* The petition is misleading where the claim is asserted that the petitioners had proxies for 1,200,000 votes for the 1961 annual meeting. What petitioners failed to disclose in their testimony and now fail to disclose in their argument are the facts that these proxies were solicited by the use of false and

(Footnote continued on following page)

United was named as a defendant in this action solely for the purpose of enabling the Court to grant adequate relief by way of ordering an adjournment of the 1961 annual meeting of stockholders which was imminent at the time of the institution of this action (C. T. 2). No other claim is made against the Company in this case (C. T. 2). Consonant with its role as a nominal defendant the Company did not take an active part in the trial of the action. No proof was offered on its behalf and cross examination on its behalf was confined to clarification. This course was dictated in recognition of the paramount public interest represented by the Securities and Exchange Commission and by the further circumstances that as the trial developed it became apparent that the defense was founded in an attack upon the procedures and, indeed, the integrity of that government agency (R. 883, 885, 893, 894, 1178). Nonetheless, the Company has a very vital interest in the outcome of this litigation because it profoundly affects private interests represented by the corporate business and financial community and the 15,000 stockholders who own the Company. The record in this case and the judicial determination that has been made thereon in the public interest confirms the action it has taken in protection of the private interests it has a duty to represent.

(Footnote continued from preceding page)

misleading proxy material and that, moreover, these proxies were obtained at a time when management had not commenced to solicit proxies (Exs. 13, 14). The form of proxy was not mailed by management until June 26, 1961 (Ex. 14) whereas the Committee had already at that time mailed its so-called report No. 1, dated March 27, 1961, its report No. 2, and its report No. 3, dated May 26, 1961 (Ex. 13). There were eligible 2,642,148 votes to be cast at the 1961 stockholders' meeting (Ex. 14). After management commenced its solicitation, it accumulated proxies for in excess of 1,400,000 votes and the proxies of the Committee were substantially reduced by those running to management revoking the earlier ones held by the Committee.

Argument

The determination of the trial Court was based squarely on findings of fact. Since these findings were sustained by the Court of Appeals and there is no attempt to demonstrate clear error, this Court will not review the determination herein. *Pick Manufacturing Co. v. General Motors Corp.*, 299 U. S. 3 (1936).

This action became moot upon the calling and holding of the 1962 stockholders' meeting.

This action has become moot and academic as the 1962 annual meeting of stockholders of United was held on May 9, 1962. (See Appendix C.) The within action pertains solely to the solicitation of proxies for the 1961 annual stockholders' meeting. It is fundamental law that when it appears in an action or proceeding for an injunction that the act sought to be prevented has occurred the case is moot and will not be reviewed by this Court. *Jones v. Montague*, 194 U. S. 147 (1904). The duty of the Court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in the case before it". *Mills v. Green*, 159 U. S. 651, 653 (1895). See also *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U. S. 416, 418 (1951).

In *Holmes v. United Mutual Life Ins. Co.*, 2 N. Y. 2d 1001 (1957) a proceeding to compel the reinstatement of a director of a corporation was dismissed as moot when an election of directors was held and the term of the petitioner's office had expired. The Court would not decide the case on the merits as to do so would be to decide a moot question. In *Sawyer v. Pioneer Mill Co.*, 300 F. 2d 200

(9th Cir. 1962) the Ninth Circuit dismissed an appeal involving the application and enforcement of the Securities and Exchange Commission's proxy rules because the stockholders' meeting for which the proxies were solicited had been held. The case at bar is even more compelling because the next succeeding annual stockholders' meeting has now been held.

The constitutionality of the statute and proxy rules has heretofore been determined.

The question of constitutionality of the Securities Exchange Act of 1934 has long since been determined. In 1956 the Second Circuit upheld both the constitutionality of Section 14(a) of the Securities Exchange Act of 1934 and the validity of the proxy rules "as applied either to management or to insurgent stockholder groups". The Court rejected a defense that the Section and the proxy rules were "unconstitutional as unauthorized delegations of legislative power and otherwise", the "otherwise" evidently referring to the argument of prior restraint under the first amendment. Chief Judge Clark, speaking for a unanimous Court, stated in *S. E. C. v. May*, 229 F. 2d 123, 124 (2nd Cir. 1956):

> "Appellants argue that § 14(a) of the Securities Exchange Act of 1934, 15 USC § 78(a), and regulations adopted thereunder are unconstitutional as unauthorized delegations of legislative power and, otherwise; *but these contentions have no merit.* American Power & Light Co. v. S. E. C., 329 U. S. 90, 67 S. Ct. 133, 91 L. Ed. 103; Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834. Furthermore, the Commission's proxy rules as applied either to management or to insurgent stockholder groups are clearly authorized by statute." (Emphasis added.)

This Court determined in *Donaldson v. Read Magazine*, 333 U. S. 178, 191 (1947), in sustaining the postal fraud

order statute, that the first amendment did not inhibit legislation like the Securities Exchange Act of 1934 which is designed to prevent fraud or deception of the public with respect to such areas as securities.

Petitioners argue that even if their proxy material was false and misleading, the Court has no power to invalidate their proxies. This argument is without merit. Once the Court's jurisdiction is properly invoked under the Securities Exchange Act of 1934 it has all the inherent powers of a Court of Equity. As the Third Circuit said in *S. E. C. v. Transamerica Corp.*, 163 F. 2d 511, 518 (3d Cir. 1947), *cert. denied* 332 U. S. 847 (1948), the trial Court "possesses the authority to make any order necessary to enforce liabilities or duties created by the Act or rules * * *"

Pointing out that Section 22(a) of the Securities Act of 1933, 15 USC § 77v(a), gave specified Courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by" the act, the Court stated in *Deckert v. Independence Shares Corp.*, 311 U. S. 282, 288 (1940):

> "The power to *enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case. If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit, providing the bill contains the allegations the Act requires. That it does not authorize the bill in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment recovered under § 12(2)."

Section 27 of the Securities and Exchange Act of 1934, USC § 78aa, has identical language in this respect. Ac-

cordingly, since equity will not suffer an offender to enjoy the fruits of his illegal action, the Courts have enjoined the *use* of proxies obtained through illegal solicitation. *S. E. C. v. O'Hara Committee*, 28 F. Supp. 523 (D. Mass. 1939); *S. E. C. v. Okin*, 58 F. Supp. 20 (S. D. N. Y. 1944); *S. E. C. v. May*, 229 F. 2d 123 (2d Cir. 1956).

The relief formulated by the Trial Court in the case at bar which permitted the Committee and the petitioners herein to resolicit is a remedy of which they cannot complain. They did not choose to take advantage of this opportunity given to them to resolicit.* As wrongdoers the relief granted accords to the petitioners an opportunity that equity does not generally reserve for them.

Stockholders of United are not indispensable parties in this proceeding.

No stockholder of United has sought to intervene in this action although all stockholders have been advised of these proceedings. The petitioners certainly have no standing to raise the issue as the decree runs to them and not to stockholders. Moreover, any such requirement to bring in fifteen thousand stockholders would be a practical impossibility.

In the case at bar the petitioners raise the lack of what they argue are indispensable parties before this Court for the first time. They did not move under Rule 12(b) of the Federal Rules of Civil Procedure prior to pleading, nor did they raise such defense in their responsive pleading. Neither did they raise the issue in any subsequent pleading or at the trial on the merits under Rule 12(h) of the Federal Rules of Civil Procedure.

* The Trial Court restrained the holding of the 1961 meeting until 34 days after the entry of its judgment and the Court of Appeals restrained the holding of such meeting for 60 days after its judgment became final.

The absence of an indispensable party is waived by the failure to assert the fact as a defense. *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-LeCoultre Watches, Inc.*, 221 F. 2d 464, 467 (2d Cir. 1955), *cert. denied* 350 U. S. 852 (1955), *reh. denied* 350 U. S. 897 (1955).

The stockholders are no more indispensable in this proceeding than the principal is in an action commenced against an agent for his fraudulent acts in obtaining his agency if such act violates public policy. The Commission commenced this action to protect the interests of the public and the stockholders as such and is so charged with this duty by statute. Securities Exchange Act of 1934 § 21(e), 15 USC § 78u(e).

Conclusion

For all the foregoing reasons and because the decision in the case at bar is not in conflict with the decision of any other Court of Appeals on the same matter, nor is it in conflict with applicable decisions of this Court, and there is no important federal question which has not been, but should be, settled by this Court, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

FRANK G. RAICHLE,
Attorney for Respondent, United Industrial Corporation,
10 Lafayette Square,
Buffalo 3, New York.

RAICHLE, MOORE, BANNING AND WEISS,
RALPH L. HALPERN,
Of Counsel.

June 18, 1962

APPENDIX A

Order of the Court of Appeals for the Ninth Circuit Dated April 24, 1962.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY E. HENWOOD, *et al.*,
Defendants and Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff and Appellee,

and

UNITED INDUSTRIAL CORPORATION,
Defendant and Appellee.

No. 17591.

ON MOTION FOR ORDER EXTENDING RESTRAINING ORDER

Before: Hamley, Hamlin and Merrill, Circuit Judges.

The motion for an order extending the restraining order entered herein by the Honorable Thurmond Clarke, United States District Judge, as modified by this court on January 17, 1962, is denied.

Treating the motion referred to above as one for a stay of mandate pending the filing, consideration and disposition by the Supreme Court of the United States of a peti-

tion for writ of certiorari to this court for the purpose of obtaining a review of the decision rendered herein on January 17, 1962, and it appearing that the decision became final on March 5, 1962. but, through inadvertence, the mandate of this court has not yet issued, and being of the opinion that this case is not one likely under the practice of the Supreme Court to be taken up by that Court on certiorari, and that the balance of convenience does not require a withholding of our mandate herein, it is

ORDERED that the motion for a stay of mandate be and the same is hereby denied, and the mandate shall issue forthwith.

Dated: April 24, 1962.

FREDERICK G. HAMLEY.
OLIVER D. HAMLIN, JR.
CHARLES M. MERRILL.

APPENDIX B

Order of the Court of Appeals for the Ninth Circuit Dated April 30, 1962.

At a Stated Term, to wit: The October Term 61, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City of San Francisco, in the State of California, on Monday the 30th day of April in the year of our Lord one thousand nine hundred and sixty-two.

Present: Honorable Frederick G. Hamley,
Presiding.

Honorable Oliver D. Hamlin,
Honorable Ben. C. Duniway,
U. S. Circuit Judges.

STANLEY E. HENWOOD, *et al.*,
Defendants and Appellants.

vs.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff and Appellee.

and

UNITED INDUSTRIAL CORPORATION,
Defendant and Appellee.

No. 17,591.

ORDER DENYING MOTION

The motion of appellants for an order holding certain appellees in contempt, etc., coming on this day for hearing,

there being no appearance on behalf of the appellants, Mr. Ralph L. Halpern argued for the appellee United Industrial Corporation. Mr. Frank E. Kennamer, Jr., attorney of Securities and Exchange Commission, being present, and waiving oral argument, and thereupon the Court ORDERED THE MATTER submitted for consideration and decision.

On consideration thereof, IT IS FURTHER ORDERED that said motion be, and hereby is denied.

APPENDIX C

President's Report to Stockholders of United Industrial Corporation Dated May 21, 1962.

UNITED INDUSTRIAL CORPORATION
660 Madison Avenue, New York 21, N. Y.

May 21, 1962

Fellow Stockholders:

The 1962 Annual Meeting of Stockholders of the company was held as scheduled on May 9, 1962, at Wilmington, Delaware.

The management slate of directors for both common and preferred stock were unanimously elected by the vote of those present in person and by proxy. Approximately 68% of the common stock and 72% of the preferred stock eligible to vote participated.

Earnings for the First Quarter of 1962

We are pleased to report that the company earned a profit of $186,795 in the quarter ended March 31, 1962, on sales of $8,006,987. This compares with a loss of $66,907 on sales of $8,097,076 in the same period last year, although results as to sales and earnings are not comparable for the reason that 1961 results included sales and income from subsidiaries which were sold or discontinued during 1961.

Earnings prospects for the balance of the year appear to be favorable. Earnings for the second quarter should exceed first quarter earnings.

Appendix C.

Backlog of the company stands at an all time high of approximately $26 million.

Cordially yours,

BERNARD FEIN,
President.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 994

STANLEY E. HENWOOD, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–5) is reported at 298 F. 2d 641. The Memorandum Decision, Findings of Fact and Conclusions of Law of the district court are reported in CCH Fed. Sec. L. Rep. ¶ 91,125.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1962. A timely petition for rehearing was denied on February 28, 1962 (Pet. 2). The petition for a writ of certiorari was filed on May 23, 1962. The jurisdiction of this Court is invoked under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa, and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 14(a) of the Securities Exchange Act of 1934, as applied through the Commission's proxy rules, is constitutionally objectionable (a) as so vague and ambiguous as to constitute an unauthorized delegation of legislative powers, or (b) as invading any right of free speech or contract.

2. Whether, in an action brought by the Commission to enjoin the solicitation of voting proxies by a Committee through the use of false and misleading communications to stockholders in violation of the Commission's proxy rules, the court may enjoin the voting of proxies obtained as a result of the unlawful solicitation, where the Committee is given an opportunity to resolicit on the basis of new and truthful communications.

STATUTE AND RULE INVOLVED

Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U.S.C. 78n(a), and Rule 14a–9 thereunder, 17 C.F.R. 240.14a–9, are set forth in the petition at pages 7 and 8 of the appendix.

STATEMENT

Petitioners, a group of seventeen stockholders of United Industrial Corporation ("UIC") associated together as the Stockholders' Protective Committee ("Committee"), were found to have violated Section 14(a) of the Securities Exchange Act of 1934 and the Commission's corporate proxy rules thereunder (Regulation 14) by making false and misleading statements in material distributed for the purpose of

obtaining proxies from UIC's approximately 15,000 stockholders. The proxies were to be voted at the 1961 annual meeting of stockholders. The various solicitation materials disseminated to the stockholders in the course of the Committee's contest for control of the corporation omitted to disclose the full extent of the participation of Bernard F. Gira and Herbert J. Petersen, resigned officers and directors of the corporation, in organizing and sponsoring the Committee, and in assisting it in its solicitation. The significance of the Committee's relationship with Messrs. Gira and Petersen was the focal point of the charges and countercharges in the contest for control, since they had resigned as president and executive vice president and as directors following the announcement by the corporation that discrepancies of approximately $7 million had been discovered in the corporation's accounts. The Committee had charged that the present management was at fault; the latter, in turn, accused Gira and Petersen, who had been the principal executive officers when the discrepancies were discovered. (F. I–4, II–3, III–3, III–4.) [1]

Shortly following the announcement of the substantial discrepancies in the corporation's accounts and Gira's and Petersen's subsequent resignations in January 1961, these individuals had a series of conferences with members of the law firm of Vaughan, Brandlin & Baggot. The Committee was formed as a direct result of these meetings. The Committee

[1] "F. —" refers to the district court's Findings of Fact and Conclusions of Law.

proposed, ostensibly on behalf of two of its members, Elmer M. Luther and Roy Williams, a slate of fifteen of its other members to be elected directors of the corporation. The Committee commenced soliciting proxies early in April 1961 for use at the annual meeting then scheduled for May 10, 1961.[2] Its various mailings of solicitation material to stockholders of UIC did not disclose, however, the full extent of the part that Gira and Petersen had played in the formation of the Committee.[3] (F. II–4, II–5, II–6, II–8, II–14, II–15, III–3.)

The management proposed a slate of directors and undertook the solicitation of proxies in opposition to the Committee. Late in April 1961 the management filed an action in federal district court to enjoin the Committee from using allegedly false and misleading proxy solicitation material. The Committee filed a counterclaim alleging that the management's solicita-

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[2] The meeting was several times adjourned to a later date by the management or postponed by court order, and no meeting was in fact held until May 1962.

[3] The facts developed at the trial, see *infra*, pp. 5–6, revealed that it was through the efforts of Gira and Petersen that four essential ingredients to the organizing of the proxy contest were furnished by them to the law firm: (1) stockholders other than Gira and Petersen ostensibly retained the law firm to initiate the contest, (2) a list of stockholders of UIC was made available to the law firm, (3) arrangements were made to retain a suitable public relations firm, and (4) a group of individuals prominent in the financial community were assembled as candidates for the board of directors (F. II–6).

tion material was false and seeking to enjoin its use and to invalidate the proxies that management had obtained. (F. I–4.)[4]

While the foregoing litigation was pending, the Commission on July 21, 1961, filed an action in the same district court to enjoin the Committee from continuing to solicit proxies using material alleged to be false and misleading. The corporation was made a defendant so that the court would be able to order an adjournment of the annual meeting for a suitable period during which resolicitations correcting the false statements could be conducted. On July 26 the district court entered a temporary restraining order enjoining the Committee from further solicitation and from voting the proxies already obtained. At the same time the court enjoined UIC, with its consent, from holding the stockholders' meeting and from soliciting proxies, as long as the temporary restraining order was in effect. (F. I–6, I–7, I–8.)

Following a six-week trial the district court on October 18, 1961, held that the Committee had violated Section 14(a) of the Securities Exchange Act of 1934 and the Commission's Rule 14a–9 thereunder, 17 C.F.R. 240.14a–9, by making statements in its proxy-solicitation material that were false and misleading. The court enjoined the three proxy-voting

[4] *United Industrial Corp.* v. *Henwood*, S.D. Calif., No. 747–61–JWH.

members of the Committee and Gira and Petersen from further solicitation unless appropriate disclosure in conformity with the findings of the court was made in the material. These defendants were also enjoined from voting the proxies already obtained by means of the unlawful solicitation material. In order to permit a resolicitation of those stockholders whose proxies had been invalidated, however, the court enjoined the company from holding any stockholders' meeting until after November 21, 1961. (F. III–3, III–4, III–6, III–7.)

The Committee, Gira and Petersen appealed. On November 7, 1961, the court of appeals stayed all further solicitations, and enjoined the holding of the annual meeting until further order. The appeal was expedited and on January 17, 1962, the court below affirmed the judgment of the district court with certain modifications not material here. The court upheld the prohibitions against solicitation by the Committee unless it disclosed that Gira and Petersen "were either directly or indirectly instrumental in initiating" the Committee and had participated with its representatives "in conducting proxy solicitations in opposition to the management," and against voting proxies already obtained by false and misleading solicitations. The court of appeals also enjoined UIC from holding any stockholders' meeting "until sixty days after this decree becomes final" (Pet. App. 1–5).[6] Following attempts in the court of appeals to stay the stockholders' meeting then scheduled for May 9,

[6] Following the decision of the court of appeals, the district court decided the suit which the corporation had instituted

1962, petitioners applied to this Court for a stay of the meeting. The application was denied on May 8, 1962, by Mr. Justice Douglas.

ARGUMENT

Although petitioners list thirteen questions presented, the first twelve actually resolve into the two questions discussed below. Petitioners' thirteenth question—whether the trial court's findings that Gira and Petersen covertly initiated and aided the Committee in its solicitation of proxies are sustained by the evidence—is the basic question in this litigation and, we submit, was correctly resolved by the courts below; in any event, however, further review of this factual question is plainly unwarranted. Petitioners' other contentions are without merit, and there is no conflict of decisions. Accordingly, there is no occasion for review by this Court.

1. (a) There is no merit to petitioners' contention (Pet. 18–19) that Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U.S.C. 78n(a), does not provide sufficiently definite standards and is therefore an unlawful delegation of a legislative function to the Commission. This Court has consistently approved comparable statutory provisions as being sufficiently definite.

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against the Committee (see pp. 4–5, *supra*) in favor of the corporation, and rejected the Committee's counterclaim. The court held that the corporation's solicitation material was not false and misleading in charging that the Committee was acting as a front for Gira and Petersen. *United Industrial Corp.* v. *Henwood*, S.D. Calif., No. 747-61-JWH.

Section 14(a) prohibits the solicitation of proxies from stockholders of corporations, the securities of which are listed on national securities exchanges, in contravention of such rules as the Commission might prescribe "as necessary or appropriate in the public interest or for the protection of investors." Pursuant to this direction the Commission has fashioned Regulation 14, which consists of eleven rules and two schedules of information required to be disclosed. Rule 14a–9, the provision which is here involved, prohibits the use of false and misleading statements in communications to stockholders. It follows the pattern of the anti-fraud provisions of the Securities Exchange Act (Section 10(b), 15 U.S.C. 78j(b), and Rule 10b–5, 17 C.F.R. 240.10b–5) and its companion statute, the Securities Act (Section 17(a), 48 Stat. 84, as amended, 15 U.S.C. 77q(a)), which make unlawful fraudulent statements in the course of buying or selling securities.

Challenges to the constitutionality of Section 14(a) similar to that made by petitioner have been rejected as having "no merit", *Securities and Exchange Commission* v. *May*, 229 F. 2d 123, 124 (C.A. 2), and as being "thoroughly shopworn", *United States* v. *Guterma*, 189 F. Supp. 265, 273 (S.D. N.Y.). The standards in Section 14(a) are no more vague than many others long approved by this Court. See, *e.g.*, *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24; *United States* v. *Chemical Foundation*, 272 U.S. 1, 12; *Avent* v. *United States*, 266 U.S. 127, 129 (public interest); *Union Bridge Co.*

v. *United States*, 204 U.S. 364, 385 (unreasonable obstruction to navigation); *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 285 (public convenience, interest, or necessity); *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 577 (other economic conditions); *Yakus* v. *United States*, 321 U.S. 414, 423 (fair and equitable and which will effectuate the purposes of the Act); *Lichter* v. *United States*, 334 U.S. 742, 778 (excess profits). See also *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 104–106, where this Court upheld the standard "unduly or unnecessarily complicate the structure" of a holding company system or "unfairly or inequitably distribute voting power among security holders," established by Congress in Section 11(b)(2) of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U.S.C. 79k(b)(2).

(b). Petitioners' contention (Pet. 19, 22–24) that the proxy rules constitute a prior restraint on freedom of speech is equally lacking in merit. The Commission has no power of "censorship" (Pet. 19). While the Commission's proxy rules require that preliminary copies of proxy materials be filed with the Commission prior to distribution to stockholders,[6] such material may be distributed in definitive form ten days after filing, with or without the Commission's assent.[7] If the Commission deems any statements in the material to be false and misleading, its sole remedy is to seek

[6] Rule 14a–6, 17 C.F.R. 240.14a–6.

[7] *Ibid.*; see also Section 26 of the Securities Exchange Act, 48 Stat. 902, 15 U.S.C. 78z.

an injunction in district court. Thus, there is no administrative restraint. And so far as a judicial restraint is concerned, we submit that under no decision of this or any other court could an injunction issued to prevent the perpetration of a commercial fraud upon the investing public be deemed a prior restraint of the exercise of freedoms protected by the Constitution.

To petitioners' contention that the prohibition against their voting the proxies unconstitutionally violated individual stockholders' property and contract rights (Pet. 24–27), there are two answers. In the first place, the district court's decree and the court of appeals' mandate expressly provided that the stockholders' meeting be postponed long enough to permit further solicitation of proxies, so that the individual stockholders might have an opportunity to exercise their franchise on the basis of complete and accurate information. Secondly, the invalidation of the proxies obtained by the Committee at most deprived individual stockholders only of the "right" to cast their votes through proxies that had been fraudulently solicited. We suggest that there is no public or private interest—certainly none of constitutional dimensions—to be vindicated in protecting the exercise of a franchise on the basis of false and misleading statements. *See Central Foundry Co.* v. *Gondelman*, 166 F. Supp. 429, 447 (S.D. N.Y.).

2. Petitioners contend (Pet. 17, 24–27) that the court's decree restraining the voting of the Committee's proxies was not authorized by the applicable statutory provisions. The Commission's suit invoked

the equitable powers of the district court pursuant to Section 27 of the Securities Exchange Act, 48 Stat. 902, as amended, 15 U.S.C. 78aa.[a] The injunction against voting the proxies obtained by misleading statements was ancillary to the restraint against continued violations of the proxy rules. Such a decree was necessary in order to make that injunction meaningful, and to effectuate fully the statutory purpose of affording full protection to the rights of security holders. In addition, the court afforded the Committee ample opportunity to resolicit proxies in conformity with its findings, and such resolicitation, had it been undertaken, would have provided the stockholders with an adequate means of exercising their franchise.

Injunctions against the use of proxies obtained through violation of the proxy rules, together with the postponement of a stockholders' meeting to permit a suitable resolicitation, have been held to be proper forms of relief in suits in equity under Section 27. *Securities and Exchange Commission* v. *May*, 134 F. Supp. 247 (S.D. N.Y.), affirmed, 229 F. 2d 123 (C.A. 2); *Central Foundry Co.* v. *Gondelman*, 166 F. Supp. 429, 446 (S.D. N.Y.); *Securities and Exchange*

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[a] Section 27, as here pertinent, provides:

"The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder."

Commission v. *Transamerica Corp.*, 67 F. Supp. 326 (D. Del.), modified and affirmed, 163 F. 2d 511 (C.A. 3), certiorari denied, 332 U.S. 847; *Securities and Exchange Commission* v. *Okin*, 58 F. Supp. 20 (S.D. N.Y.); *Securities and Exchange Commission* v. *O'Hara Re-election (or Proxy) Committee*, 28 F. Supp. 523 (D. Mass.). Such injunctive relief to effectuate statutory provisions is neither improper nor unusual. Compare *Mitchell* v. *DeMario Jewelry*, 361 U.S. 288, 291; *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398; *Deckert* v. *Independence Corp.*, 311 U.S. 282, 288; *Los Angeles Trust Deed & Mortgage Exchange* v. *Securities and Exchange Commission*, 285 F. 2d 162 (C.A. 9) certiorari denied, 366 U.S. 919.

There are no conflicting court of appeals decisions regarding the power of courts to enjoin the voting of proxies obtained pursuant to unlawful solicitations. In the *Transamerica* case, *supra*, the management had violated the Commission's proxy rules by failing to bring before the stockholders certain proposals of a stockholder, and there was no claim that the material contained false and misleading statements relevant to election of directors. The court enjoined the use of the proxies for any purpose except the election of directors (67 F. Supp. at 329). The other federal court decision cited by petitioners in this connection (Pet. 22) also upholds the power exercised by the court below. As is made clear in the *Okin* case, *supra*, 58 F. Supp. at 21, 25, the district court enjoined the voting of proxies solicited with material containing false and misleading statements.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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